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Against the Grain?
Member State Interests and EU Procurement Law

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ABSTRACT

EU public procurement law has been increasingly criticised for the restrictions it places on Member States' regulatory autonomy and for the imposition of neoliberal conceptions of State intervention in the economy that do not necessarily match the general preferences of Member States with a social market economy orientation. Following that view, it could be thought that there is a limited (and possibly narrowing) space for Member State interests in EU public procurement law—or, in other words, that pursuing national interests goes against the grain of the internal market foundations of the 2014 Public Procurement Package.

The purpose of this chapter is to dispel this conception by making three points. First, that despite its competition-orientedness, the 2014 Public Procurement Package does not impose a 'one-size-fits-all' straitjacket on domestic economic systems, but is rather compatible with diversity of economic models at national level. A series of complex trade-offs resulting from the last revision of the EU public procurement rules, where Member State interests played a multifaceted role, have consolidated a competition-based model with significant flexibility for non-market and non-competed mechanisms, as repeatedly tested before and confirmed by the Court of Justice. Second, that EU public procurement law, however, *does appropriately* prevent Member States from pursuing protectionist policies, even if they consider them to be in their national interest—*quod non*, because the proper working of the internal market is *both* in the collective interest of the EU *and* of the individual Member States. Third, that EU public procurement law, in particular in its current incarnation in the 2014 Public Procurement Package, emphasises the ability of Member States to pursue secondary policies (such as the promotion of innovation or sustainability) in a diverse manner, in accordance with their domestic interests and local particularism. On the whole, thus, EU public procurement law allows Member States significant space to pursue their national interests, always provided that they are also compatible with their own interest in the proper functioning of the internal market.

KEYWORDS

Public procurement, national interest, regulatory space, internal market, regulatory reform.

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1 Introduction

One of the main analytical threads of this book requires a consideration of the ability of the Member States to promote local interests and to sustain local particularism under common EU policy frameworks, as well as its contribution to the balanced and sustainable operation of individual EU policies and of the Union as a whole. At first blush, this may seem to go fundamentally against the grain of EU public procurement law which, as the Court of Justice has repeatedly put it, aims '*to develop effective competition in the field of public works contracts*',[2] in particular through the application of '*the principle of the equal treatment of tenderers and the corollary obligation of transparency*'.[3] Indeed, even in its more minimalistic conceptualisation, the EU rules on public procurement are framed as an internal market tool primarily concerned with the demolition of domestic preferences and the suppression of discrimination based on nationality (Arrowsmith 2012). Following that view, it could be thought that there is a limited (and possibly narrowing) space for Member State interests in EU public procurement law. Indeed, EU public procurement law has been considered to both impose a neoliberal conception of the role of the State in the economy that does not necessarily match the general preferences of Member States with a social market economy orientation (Kunzlik 2013), and severely constrain the regulatory space left to Member States, which can only be regained through a restrictive interpretation of EU procurement rules and their goals (Arrowsmith 2012). Thus, the preservation or promotion of space for national interests within the EU procurement architecture may seem anathema. In simple terms, it could be thought that the core goals of the EU public procurement rules oppose the preservation of national interests and that it is impossible to both maximise the goal of the rules—and, thus, optimise or at least improve the functioning of procurement markets in the EU—and simultaneously further Member States' ability to pursue differentiated policies in their interest. This would, in the extreme, identify EU procurement law as unduly restrictive or even contrary of Member States' national interests.

However, accepting this simplified account would mask the tension between two intertwined dimensions of EU law: the decisional and the normative (Weiler 1991). First, from a decisional perspective, it is worth stressing that the EU procurement rules, currently in their fifth generation, are the result of the collective decision-making of the Member States in the context of (several iterations of) the EU legislative process. Thus, they inevitably reflect the interests pursued by the Member States, which shaped this set of rules. Hence, it seems difficult to accept the existence of a contradiction between Member States' interests and the design of the regulatory system of EU procurement (or, in other words, its underlying economic structure). EU procurement law is the output of a legislative process with substantive Member State input and, logically, it reflects their (collective) interest. Second, from a normative perspective, it also seems clear that domestic or local interests play a much more limited role in informing the interpretive activities of the Court of Justice (Bengoetxea 2015; Höpner & Schäfer 2012). When EU procurement law comes to the Court for interpretation, just like in any other area of EU economic law, the normative baseline adopted by the Court may deviate from the compromises achieved between the different national interests or preferences (in economic policy) embedded in the adoption of EU legislation (Clift & Woll 2012). The case law may even put pressure or neutralise such compromises and ultimately trigger new iterations of the legislative process in an attempt by Member States (with the necessary support, or at least cooperation by the European Commission) to rebalance EU law (Allerkamp 2016). However, any anticipated rejection of an intended normative push by the Member States is likely to trigger an anticipatory restraint by the

[2] Judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden*, C-138/08, EU:C:2009:627, paragraph 47.
[3] Judgment of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 28.

Court of Justice[4] and, ultimately, normative tensions seem to be a dynamic phenomenon where both the Court and Member States exercise influence on each other. Ultimately, and at least to some extent, the normative underpinnings of the interpretation of EU law by the Court of Justice are also constrained by Member States' interests. Beyond this normative analysis, some of these issues raise important questions about the extent to which a clash of economic paradigms can be identified between EU law and national interests, or whether any issues evidenced by the involvement of the Court of Justice are reflective of the different interests pursued by national governments in the context of EU law-making and domestically, or even whether the apparent discrepancies result from improper or flawed transposition at national level. Ultimately, it is also not clear that the normative reading that Member States make of EU law is necessarily the one that would be endorsed by the Court of Justice, and discussions on overcompliance with EU law have been pervasive for the last two decades. Therefore, to some extent, the discussion on the implicit normative tensions in EU economic law also needs to take into account that Member States (and stakeholders more generally) may distort or misrepresent the constraints derived from EU law when they see them through what they perceive to be a different normative framework.

Following up on this basic intuition, in this chapter I take issue with a general approach to the interaction between the EU public procurement rules and Member State interests that saw them as fundamentally opposed, or in an irreconcilable tension due to the incompatibility of diverging economic models at EU and domestic level. In order to dispel this conception, I attempt to make three points. First, I claim that, despite its competition-orientedness, the 2014 Public Procurement Package[5] does not impose a 'one-size-fits-all' straitjacket on domestic economic systems, but is rather compatible with diversity of economic models at national level. A series of complex trade-offs resulting from the last revision of the EU public procurement rules[6] have consolidated a competition-based model with significant flexibility for non-market and non-competed mechanisms, as repeatedly tested before and confirmed by the Court of Justice. Ultimately, Member States retain a decision on whether to resort to the market at all, and EU law only kicks in once they decide to avail themselves of competition-based mechanisms for the acquisition of goods or the contracting of works and services. This creates significant leeway for Member States to implement policy choices based on their preferred economic model, and EU economic law only imposes constraints once the chosen model implies market interaction (section 2). Second, I submit that EU public procurement law, however, *does appropriately* prevent Member States from pursuing protectionist policies, even if they consider them to be in their national interest—*quod non*, because the proper working of the internal market is *both* in the collective interest of the EU *and* of the individual Member States (Isee Varju in chapter 1 of this book, and below section 3). Third, I show that the 2014 Public Procurement Package emphasises Member States' ability to pursue non-protectionist secondary policies (such as innovation or sustainability) in a diverse manner, in accordance with their domestic interests and local particularism (section 4). On the whole, thus, I conclude that EU public procurement law allows Member States significant space to pursue their national interests, always provided that they are also compatible with their own interest in the proper functioning of the internal market (section 5).

[4] Arguably, this has been the case in the area of free movement of persons, Jimena Quesada 2017. *Cf* Judgment of 11 November 2014, *Dano*, C-333/13, EU:C:2014:2358.

[5] The 2014 Public Procurement Package comprises Directive 2014/23/EU on concessions, Directive 2014/24/EU on public sector procurement and Directive 2014/25/EU on utilities procurement.

[6] Member State interests played a multifaceted role; see Caranta 2015; Ølykke and Sanchez-Graells 2016.

2 Competition-Oriented Public Procurement and Diversity of National Economic Models

The foundations and legal basis of EU public procurement law are in the EU's internal market fundamental freedoms. However, it is also clear that EU public procurement law relies on *competition in the market* as the mechanism to ensure that it attains its goals (Sanchez-Graells 2015). And, congruently, the 2014 Public Procurement Package displays the necessary competition-orientedness, eg through the consolidation of competition as one of its general principles (Sanchez-Graells 2016a). EU public procurement law thus places significant constraints on the way Member States can avail themselves of competition in the market for the purposes of their buying needs. However, the recognition of this simple *functional* fact should not be conflated with an attempt to '*replicate in the public market the competitive process of the private market*' (Arrowmith 2012), nor does it support the view that '*the regulation of public procurement by the EU … maps closely onto the … neoliberal construct*' (Kunzlik 2013).

In general, such type of views come to reduce the discretionary space that Member States retain in establishing the boundaries of the market and non-market activities they undertake, in accordance with their domestic economic model. Ultimately, in designing their economic activities and the shape of their public sector, Member States control the trigger for the application of EU public procurement rules. As long as they do not engage the market as a competition-based instrument for the sourcing of inputs, Member States are free from the constraints identified in the EU public procurement rules. In other words, while it is clear that the EU public procurement rules aim at creating a free internal market for the supply of the public sector across the EU (Arrowsmith 2011: 44–47), it should be no less apparent that the Member States are the ones that—individually, and through their decisions on what to produce and what to source—draw the boundaries of that market. Additionally, it should be taken into consideration that public procurement under the EU rules relies on markets as generally regulated, but the EU public procurement rules are not in themselves a tool for the general regulation of the economy (Sanchez-Graells 2018a). Thus, in contrast with the criticisms of the EU public procurement rules on the basis of (neoliberal) market imperialism, I argue that the competition-orientedness of the 2014 Public Procurement Package does not impose a 'one-size-fits-all' straitjacket on domestic economic systems, but is rather compatible with diversity of economic models at national level entailing different levels of reliance on the market for the supply of inputs needed in the public sector for the discharge of its missions (*cf* Sauter & Schepel 2009).[7] This is clearly the case in the context of the delivery of public services (discussed below), but the flexibility of the 2014 Public Procurement Package to tailor its general requirements to the idiosyncrasies of domestic economic models cuts across its design. Given the regulatory strategy based on the adoption of directives rather than regulations, and the retention of effective decision-making powers at national level as a result of the competence-split between the EU and the Member States and the constraints derived from the principle of subsidiarity—in effect, the 2014 Public Procurement Package consolidates a regulatory architecture where certain aspects of rule-making are centralised while others remain at the national level (eg, the space for choices on sustainability, below section 4). Consequently, this regulatory architecture necessarily leaves space for domestic economic policies, and the execution of public procurement at domestic level is ultimately reflective of the choices made by the Member State in a decentralised manner (which are then subjected to a legality test to ensure that they do not exceed the policy space left at EU level). To assess the extent to which EU rules leave policy space to domestic discretion, it is useful to stress that the EU public procurement rules would

[7] To be sure, this does not mean that the current situation is desirable and, in my view, EU public procurement law is affected by some inconsistencies that I have criticised elsewhere from a normative perspective. However, *de lege data*, the EU public procurement system offers space for diverse national approaches.

be compatible with a Member State economic model that implied no interaction with the market whatsoever.

Indeed, in line with the general principle of neutrality of ownership in Article 345 TFEU, EU public procurement law does not mandate Member States to resort to the market at all. To begin with, in the context of the provision of public services, the Court of Justice has recognised that aspects of the economic model constitutionalised at domestic level can effectively exclude the applicability of the EU public procurement rules,[8] for instance, by establishing the compatibility with the EU internal market of domestic mechanisms that reserve certain activities to third sector (non-profit) entities (Caranta 2016; Telles 2016; Sanchez-Graells 2016c). This comes to create space for diversity of economic models where Member States provide adequate constitutional protection to differential values of economic participation,[9] as long as the main characteristics underpinning the special nature of public services are respected (eg the principles of universality, the good of the community, economic efficiency and suitability of the chosen mechanisms)[10] (Sauter 2015).

Further, not only in relation with the provision of public services—both those of general economic interest, and those of a social or non-economic nature (Fanøe Petersen & Ølykke 2016)—but more generally, Member States are free to keep the acquisition of goods, works and services necessary for the discharge of their public mission obligations completely shielded from competition in the market. In order to do so, Member States can keep their activities *in-house* and carry them out with their own productive resources (or those of controlled entities), as well as enter into increasingly complex forms of public-public cooperation that do not require putting public contracts out to tender. Under Article 12 of Directive 2014/24/EU,[11] and with some limitations aimed at ensuring that no private provider or investor is placed at an advantage in the relevant markets,[12] Member States that decide to engage in the direct award of contracts to entities within the public sector, or over which the public sector exercises effective control, are exempted from compliance with the EU procurement rules. And this exemption stands even if those entities *themselves* engage as offerors in market transactions, provided that these are ancillary activities of the *in-house* entity,[13] or form a relatively minor part of the public-public collaboration.[14] Indeed, *in-house* entities and public authorities involved in a public-public collaboration can offer up to 20% of their activities in the market without this circumstance excluding their exemption from the need to tender contracts for the relevant works, services or supplies. So, on the whole, this set of exemptions not only allows the Member States to hold different views on the nature and boundaries of any mixed market economic model they may want to implement, but also to explore different ways of funding public activities through different levels of participation in market transactions (as allowed under Article 106 TFEU). This is clearly conducive to diversity of economic models, where Member States are free to expand or contract their involvement in the direct provision of goods, services and works required in their activities. It may seem unrealistic to think that a Member State would keep *all* of its requirements *in-house* or be in a

[8] Judgment of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56. See also Judgment of 11 December 2014, *Azienda Sanitaria Locale No 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440.

[9] This is in line with the requirement for Member States to adopt adequate legislative and regulatory frameworks in the context of the provision of services of general economic interest. See Judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415.

[10] *Spezzino*, EU:C:2014:2440, paragraph 53.

[11] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

[12] See Judgment of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 51; Judgment of 19 June 2014, *Centro Hospitalar de Setúbal and SUCH*, C-574/12, EU:C:2014:2004, paragraphs 38 & 40.

[13] See Judgment of 8 December 2016, *Undis Servizi*, C-553/15, EU:C:2016:935.

[14] See Judgment of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985.

position to design systems of public-public cooperation that do not require *any* inputs from commercial markets, but EU law is not prescriptive and each Member State is free to choose what to make and what to buy in accordance with its own circumstances—which is, of course, also in line with the requirements of Article 345 TFEU.

In addition to these sources of diversity in domestic economic models, recent case law of the Court of Justice seems to point towards the emergence of a restrictive trend in the classification of market transactions as 'public procurement', in particular where the public authority does not directly choose the provider of goods or services, but rather sets up frameworks for decentralised choice of the specific supplier by end users or intermediate gatekeepers (eg pharmacists or doctors, in the context of healthcare-related procurement). Such a narrow interpretation of the concept of public procurement that delineates the scope of application of the 2014 Public Procurement Package has the potential to further reduce the coverage of this set of EU rules and simultaneously expand the policy space for Member States seeking to structure transactions for the supply of goods and services directly to their citizens in ways that do not require public tenders—although they remain subject to general requirements of EU free movement law.[15]

Finally, even when the 2014 Public Procurement Package is fully applicable and even in the absence of explicit constitutional protections (as above), the relevant rules allow Member States to ringfence public contracts for the provision of social and specific services (mainly, in the areas of healthcare and education, and for a duration of three years) in favour of organisations with a public service mission and that meet the additional conditions of Article 77 of Directive 2014/24/EU. This exceptional mechanism allows Member States to use public procurement to foster participation by specific types of providers, to nurture innovative approaches to corporate governance and public service provision, or even to restructure the public sector through mutualisation and other spin-off initiatives (Boeger 2018; Szyszczak & Sanchez-Graells 2014).

On the whole, these sets of restrictions, exemptions and special regimes in the 2014 Public Procurement Package and the interpretive case law of the Court of Justice come to set a system where Member States retain very significant levels of freedom and discretion to decide when and to what extent to resort to the market for the procurement of goods, services and works needed for the discharge of their missions. The competition-orientedness of the EU public procurement rules only kicks in once the Member States, on the basis of their national economic model of choice, decide to avail themselves of the market mechanism for the sourcing of goods, services and works. Such decision on whether to resort to the market at all is not inconsequential, and Member States could be making inadequate economic choices on the basis of flawed economic models. However, EU economic law (*ie* public procurement, but also State aid) is not meant to control the adequacy or desirability of the Member States' decisions in this regard (*ie* general EU law does not mandate economic efficiency),[16] but is solely concerned with compliance with competition-oriented requirements once the Member State decides to rely on market interactions and competition-based mechanisms. Thus, it can hardly be said that EU procurement law imposes any specific type of economic model and, in my view, there is ample space, arguably even excessive space, for Member States to avoid its application. The following two sections look in detail to the constraints that derive from EU public procurement rules *once and where applicable*, but let's not forget that, as discussed in this section,

[15] Judgment of 2 June 2016, *Falk Pharma*, C-410/14, EU:C:2016:399.

[16] Of course, this does not apply to exceptional interventions in the context of economic crises, where the EU Institutions have clearly intervened to put pressure on Member States to change their economic model if it was seen as preventing recovery and/or threatening the stability of the European economy as a whole. This issue, however, is analytically different and its assessment exceeds the possibilities of this chapter.

Member States retain almost absolute discretion in deciding for which activities to resort to market mechanisms at all.

3 EU Public Procurement and Member States' Protectionist Interests

The fact that EU public procurement rules do not impose constraints on the design of the domestic economic model, as discussed above, does not mean that they are also ineffectual in the implementation of that economic model. On the contrary, and in relation with any aspects of that model that imply State participation in market transactions as a buyer, EU public procurement law *does appropriately* prevent Member States from pursuing protectionist policies, even if they consider them to be in their national interest, primarily in the context of their industrial or labour policies. In that regard, Member States are often tempted to impose restrictions on the participation in tenders for public contracts to support their domestic industry and/or labour market. EU public procurement rules proscribe such type of economic policies through a strict application of the principle of non-discrimination. This could be seen as a significant restriction of the space for Member States regulatory discretion and, ultimately, as a violation of their national interest. I strongly disagree with any such proposition. In the context of the discussion in this book, it may be worth clarifying why, in my view, those claims would be based on a simplistic and improper understanding of the national interest, before assessing the ways in which EU public procurement law prevents such a pursuit.

3.1 Protectionist Interests as Anti-Internal Market National Interests

One of the difficult issues that arise when Member States pursue protectionist industrial or labour policies is to determine whether they can be in their national interest. In my view, there are two main arguments against this. First, at a conceptual level, it seems clear that every Member State holds an interest in the proper functioning of the internal market, which is thus not an extraneous interest of the Union, but also (and primarily) a national interest of each of the individual Member States (Varju 2015a and 2015b). Therefore, claiming that protectionist policies would be in the national interest is simplistic because it fails to recognise that their pursuit would damage the functioning of the internal market and, concurrently, the vested interest of the Member State in its functioning. The ability of Member States to engage in protectionism would simply unravel the internal market. Thus, aiming to further protectionist policies at domestic level seems to negate the possibility of a balanced and sustainable operation of individual EU internal market policies (such as procurement) and of the Union as a whole. Ultimately, a conceptualisation of a domestic interest opposed to the rules of the internal market reflects a position which would require the promotion of the conflicting national interest *outside* EU law (or the EU itself) and cannot reflect a properly understood national interest of a Member State of the Union—*ie* either it is in the national interest to remain a member of the EU and benefit from the internal market, and thus compliance with EU law and its limitations *is in the national interest* (as well as the collective interest of the EU), or else the constraints derived from EU law are seen to run *against the national interest* and the State must thus bring its membership to an end.[17] Therefore, in my view, the narrative concerning EU public procurement law's suffocation of the regulatory space for the pursuit of protectionist (economic) national interests comes to negate that the proper functioning of the internal market is *both* in the interest of each of the Member States and of the Union itself—which is too simplistic and short-sighted. Thus, from this perspective, even a complete suppression of the space for the pursuit of *protectionist* policies in the context of procurement would not run against the national interest of Member States *qua* members of the Union. At a conceptual level, accepting this alternative position would diminish the legitimacy of the

[17] This is, of course, plainly clear in the context of Brexit. However, it is also clear that the national interest and the acceptance of EU law is multifaceted and requires complex trade-offs in an overall assessment.

claims for a narrow construction of the EU public procurement rules with the aim of freeing up space for regulatory discretion for the Member States to pursue anti-internal market protectionist policies. Of course, there is still a related issue concerning the competence and legitimacy to carry out these assessments and any involvement by the Court of Justice in providing an interpretation of the space left for any policy perceived to be protectionist—*ie* to delineate the space for domestic interests in this regard—is bound to be challenged, potentially by both sides, on the basis of the level of deference afforded to domestic policies (Azoulai 2013). However, the need remains for these issues to be adjudicated, as political processes seem limited in their ability to reach the necessary level of detail. Rejecting the Court of Justice's intervention as limitative of domestic interests will, of course, always remain a political option. But, in my view, one that is bound to be short sighted.

Second, and from a broader normative perspective, setting the boundaries of the national interest that can be considered relevant in the context of public procurement requires a discussion of its main goals that exceeds the possibilities of this chapter. At its basics, there can be discussion on whether procurement has a single or multiple goals (Schooner 2002), but it seems to me undeniable that its main function, or at least one of its main goals, is to facilitate the acquisition of goods, services and works required by the public sector in the discharge of its missions (Trepte 2004; UNCTAD 2012; Sanchez-Graells 2015). Simply, the more efficient the procurement system, the better position the State will be in to cater to the needs of its population. From that perspective, it seems to me that the main (overarching) national interest in the operation of a procurement system is to ensure that the public buyer obtains the best possible value for taxpayers' money.[18] From that perspective, it seems difficult to accept that implementing protectionist procurement policies could be in the national interest because reduced competition for public contracts would result in either higher prices, lower quality, or a mix of both. In reality, protectionist procurement would have strong redistributive effects (between taxpayers and the protected domestic industry or local labour market), as well as uncertain and difficult to measure effects on the overall welfare of the country—and, as the literature on trade liberalisation and procurement shows, this is more than likely to be detrimental to national economic interests in the long-run (Anderson, Kovacic & Müller 2016). Moreover, procurement is not an apt tool to engage in redistributive policies, but rather a tool for their implementation, which effectiveness affects that of the redistributive policies in the first place (Sanchez-Graells 2018a). This also applies to non-protectionist uses of procurement for the achievement of secondary policies, and shows how instrumentalising procurement can have the double detrimental effect of reducing its effectiveness and that of the policies it aims to support. However, given the focus of EU procurement law on the prevention of protectionism, the following section is solely based on the conceptual argument above.

3.2 Public Procurement as a Ban on Anti-Internal Market Protectionist National Interests

As mentioned above, EU public procurement rules proscribe protectionist economic policies through a strict application of the principle of non-discrimination. Indeed, discrimination of potential contractors based on their nationality or place of establishment is absolutely forbidden by Article 18(1) of Directive 2014/24/EU, which requires that contracting authorities treat economic operators equally and without discrimination. Such obligation of equal treatment is not limited to EU undertakings, but is also extended by Article 25 of Directive 2014/24/EU to economic operators of the signatories of the World Trade Organisation Government Procurement Agreement and the other international agreements by which the Union is bound. Beyond this general principle, a host of specific rules in the 2014 Public Procurement Package are explicitly concerned with prohibitions against discrimination

[18] For the purposes of the discussion, whether the pursuit of value for money stems from obligations under EU law or from an independent choice by the Member States is irrelevant, as my claim is that all Member States will always have an interest in extracting best value for money spent through procurement.

(on the basis of protectionist policies, or otherwise). In particular, discrimination on the basis of the origin of the goods or services to be provided is explicitly forbidden by Article 42(4) of Directive 2014/24/EU, which establishes that technical specifications shall not refer to a specific make or source, or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Where justified by the subject-matter of the contract, such reference shall be permitted on an exceptional basis, but only where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant is not possible, and shall always be accompanied by the words 'or equivalent'—which comes to deactivate any local or domestic preference. In addition to this, where specific internal market rules control technical harmonisation, contracting authorities are obliged to accept supplies marked as compliant and, in case they consider their acquisition undesirable for technical reasons, they need to use the non-procurement channels established in EU law.[19] Along the same lines, the specific rules on award criteria, and in particular to the methodologies linked to assessments of life-cycle costing—which could potentially be used as an indirect mechanism for favouring suppliers from domestic markets on the presumption that closer supply chains involve lower environmental impact—also reiterate the obligation of formulating them so as to '*ensure the possibility of effective competition*' (Art 67(4)), and using methodologies based on '*objectively verifiable and non-discriminatory criteria*' (Art 68(2)(a)). All of this is clearly in line with the case law of the Court of Justice, which has been consistent in striking down requirements aimed at favouring domestic undertakings[20] or the domestic economy[21] and, more generally, in combating all sorts of discrimination based on nationality or State of establishment in the context of public procurement.

However, difficulties arise in the implementation of the requirements of the principle of non-discrimination where a given intervention by the State is not solely controlled by the EU public procurement rules, but also by flanking regulatory instruments of EU economic law, such as State aid[22] or labour law. Taking the latter as an example, where Member States adopt measures aimed at the protection of their domestic labour markets in the context of public procurement (eg by imposing minimum wage requirements to prevent social dumping), the compatibility with EU law of those measures is not only determined by the public procurement rules, but also by the EU labour law *acquis* and, in particular, by the Posted Workers Directive.[23] In these situations of regulatory overlap, there is a clear tension between, on the one hand, the non-discrimination goals and logic of the EU public procurement rules, as well as those of the underlying TFEU provisions on internal market fundamental freedoms (most notably, Art 56 TFEU)[24] and, on the other, the space for domestic differentiation and protection of the national labour market in the Posted Workers Directive (Barnard 2018). Cases controlled by the EU public procurement rules and general internal market rules evidence a prohibition against the implementation of protectionist measures in favour of the local labour market where they would deprive undertakings from other Member States of their competitive advantage derived from their engagement of a work force based in a jurisdiction with lower labour costs.[25] Conversely, cases controlled by the Posted Workers Directive import into the public procurement sphere the alternative balance of interests implicit in the regulation of the EU single labour market (or its absence), and tolerate practices that result in (legislated) protectionism of the domestic labour

[19] Judgment of 14 June 2007, *Medipac – Kazantzidis*, C-6/05, EU:C:2007:337.
[20] Judgment of 27 October 2005, *Contse and Others*, C-234/03, EU:C:2005:644.
[21] See the seminal Judgment of 22 June 1993, *Commission v Denmark (Storebaelt)*, C-243/89, EU:C:1993:257.
[22] On the topic of State aid, see the contribution by De Cecco to this book.
[23] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1.
[24] On this, see the contribution by Papp to this book.
[25] Judgment of the Court 18 September 2014, *Bundesdruckerei*, C-549/13, EU:C:2014:2235, paragraph 34.

market in the context of public procurement,[26] at the potential expense of cross-border competition for public contracts. This may be seen as a blur in the EU public procurement regulatory regime that opens the door to protectionist measures by the Member States. However, at the risk of being considered a purist, I would submit that this distortion results from the regulatory overlap; that it does not show limitations intrinsic to the public procurement regime, but rather of the more politically entrenched interests in the regulation of labour markets. Of course, this could hardly be any different, given the need to respect the rules of different areas of EU economic law in their entirety,[27] and regardless of the different level of development of the rules of the internal market in its different dimensions.

Similarly, some distortions can derive from the treatment of tenders that benefit from State aid. In general terms, the interaction between procurement and State aid is two-fold. First, the award of public contracts could be used as a means to grant disguised State aid—eg by awarding contracts in unduly favourable circumstances, or for goods or services that the contracting authority does not need. This is a matter regulated under State aid law and has received due attention in the 2016 Communication of the European Commission on the notion of aid.[28] In general, though, compliance with EU public procurement rules in a way that ensures market exposure, non-discriminatory procedures and restrictions on the discretion of the contracting authority to deviate from market benchmarks is considered to ensure compatibility with State aid rules (Ølykke 2017; Sanchez-Graells 2012 and 2013). Second, and more important for our discussion, public procurement procedures could be distorted if tenderers that receive State aid were able to submit tenders that undercut non-publicly-subsidised competitors. This situation requires EU public procurement law to create safeguards oriented at reinforcing the enforcement of the EU rules on State aid and, primarily, the prohibition in Article 107(1) TFEU. This is the purpose of the rules in Article 69(4) of Directive 2014/24/EU, which foresees that where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone when the tenderer is unable to prove that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU (Ølykke 2016). This provision is limited in two ways: it only applies to tenders that have been found to be abnormally low, which limits is scope of application if the publicly-subsidised tenderer adopts specific types of limit pricing; and, additionally, it defers to the analysis of compatibility under the State aid rules, which can create some space for *de facto* implementation of protectionist or anti-internal market strategies by the Member States, in particular in the context of shifting enforcement priorities in that area (Sanchez-Graells 2016d). Nonetheless, once again, any resulting space for the implementation of anti-internal market protectionist policies by the Member States results from the rules applicable to State aid control rather than as a peculiar feature (or flaw) of EU public procurement rules.

Thus, on the whole, it seems clear that EU public procurement rules do impose significant constraints on Member States' attempts to pursue any anti-internal market protectionist policies perceived to be in their national interest. Equally, any areas where the application of the principle of non-discrimination may show shortcomings does not stem from the regulation of the procurement activities themselves, but rather from regulatory overlap that imports into the procurement context the different political balances of other areas of EU economic law, such as State aid or labour law. Ultimately, in my view, this shows a consistent approach to the regulation of EU public procurement

[26] Judgment of 17 November 2015, *RegioPost*, C-115/14, EU:C:2015:760.
[27] That, of course, does not mean that they cannot be criticised; see Sanchez-Graells (2018b).
[28] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262/1.

in a way that is both respectful of the diversity of economic models in the Member States (above 2) and functionally adapted to the needs of the EU internal market and the level playing field it creates (this section). Going beyond this assessment, the following section discusses the extent to which there is space for the pursuit of *non-protectionist policies in the national interest* in the context of the EU public procurement rules.

4 EU Public Procurement and Member States' Non-Protectionist Interests

The 2014 Public Procurement Package emphasises Member States' ability to pursue secondary policies (such as innovation or sustainability; Sjåfjell & Wiesbrock 2016; Caranta 2010) in a diverse manner, in accordance with their domestic interests and local particularism. In the same way as the EU public procurement rules are not prescriptive about the obligation to resort to the market (above 2), they also avoid prescribing the characteristics of the goods, services or works required by the public sector (Trepte 2012; Arrowsmith 2015). The 2014 Public Procurement Package follows a toolbox approach that enables contracting authorities in the Member States to implement green public procurement policies of different levels of ambition (European Commission 2016), as well as to engage in different strategies for the procurement of innovation (Procurement of Innovation Platform 2016). In doing so, Member States can operationalise their domestic preferences in these areas, as well as contribute to the attainment of the common objectives in the Europe 2020 strategy.

Beyond issues of overlapping or converging EU and national interests, there is also scope for the promotion of non-protectionist policies based on peculiar national interests. For example, Member States can promote policies aimed at tackling the peculiarities of their administrative organisation or specific problems in the functioning of their public sector, such as policies with the purpose of preventing organised crime from infiltrating the public procurement sector,[29] always provided that their interventions are adequate to the legitimate end they pursue. Moreover, according to Article 70 of Directive 2014/24/EU, contracting authorities are free to set up special conditions relating to the performance of a contract in relation to a number of considerations, such as economic, innovation-related, environmental, social or employment-related (on the latter, see above 3), provided that they are linked to its subject-matter and indicated in the call for competition or in the procurement documents. This general enabling clause also comes to specify the possibilities for Member States to require compliance with specific domestic policies in furtherance of non-protectionist interests they intend to further by means of public procurement, whether they are linked to EU policies or not.

However, the approach adopted in the 2014 Public Procurement Package has been criticised as too narrow, mainly due to the requirement that the use of procurement for the attainment of such secondary policy goals remains sufficiently linked to the subject-matter of the contract (Semple 2016). This, for example, prevents contracting authorities from imposing requirements that go beyond the scope of the public contract because they involve general corporate policies.[30] More generally, this comes to recognise that the prevention of distortions of competition remains a limit to the use of procurement to pursue seemingly non-protectionist interests in a manner that could either recreate or disguise protectionism, or otherwise distort the operation of public procurement markets (Sanchez-Graells 2016b). Ultimately, the pursuit of secondary policies and non-protectionist domestic policies is allowed, but also subjected to a strict proportionality test. This is in line with the general approach

[29] Judgment 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721.
[30] Judgment of 10 May 2012, *Commission v Netherlands*, C-368/10, EU:C:2012:284, paragraphs 102–108.

to restrictions of free movement under general Treaty rules,[31] and stems from the necessary balancing of interests where the barriers to trade derived from the pursuit of non-protectionist policies generate the same effects and impediments for the functioning of the internal market than the pursuit of protectionist anti-internal market policies. Thus, in my opinion, the regulatory space left to Member States for the pursuit of non-protectionist national interests seems adequate in the context of supranational integration in the internal market.

5 Conclusions

In this paper, I challenged the view that EU public procurement rules impose a (neoliberal) economic model on Member States and that they practically exclude, or significantly limit the possibility for Member States to pursue their national interests in the context of public procurement. On the contrary, I have shown that nothing in EU law forces Member States to avail themselves of the market for the acquisition of the inputs required in the discharge of their public interest duties. Member States retain control of the triggers for the application of the EU public procurement rules (*ie*, only they decide when to resort to the market) and, by adopting independent decisions on the shape and dimension of their own public sector, Member States collectively determine the scope of the internal market for public contracts (section 2). The restrictions on Member States' regulatory discretion thus only take place within this collectively constructed internal market for public contracts.

In that context, EU public procurement rules adopt a differentiated approach towards different types of Member States policies. Those of a protectionist nature, which include anti-internal market elements, are prohibited. The paper has not only indicated the way in which EU public procurement rules outlaw the pursuit of such policies (section 3.2), but also criticised narratives that aim to present such policies as reflective of a national interest due to their simplicity and conceptual contradictions (section 3.1). Beyond that, the paper has also argued against the instrumentalisation of public procurement for the pursuit of secondary policies (either protectionist or not; section 3.1), and engaged with areas of regulatory overlap where the need to ensure simultaneous respect for multiple sets of EU economic law results in the extension or importation into the public procurement context of issues related to eg the regulation of labour markets or the control of State aid, which can create a certain porosity of procurement markets to protectionist Member State policies (section 3.2).

The analysis has then shown how EU public procurement rules allow Member States to further non-protectionist policies, both those aligned to the Europe 2020 strategy (such as innovative and green procurement), but also those reflective of the specific circumstances of the Member State and the context in which its public sector operates. I have also addressed the criticism that the approach to such policies is too restrictive because their effects need to be closely linked to the object of the contract, and stressed that this is compatible with the general logic of EU internal market law.

On the whole, thus, on the basis of the analysis in this paper, I conclude that EU public procurement law allows Member States significant space to pursue their national interests, *always provided that* they are also compatible with their own interest in the proper functioning of the internal market. In my view, even if there is scope for improvement, this reflects a general model that adequately accommodates the different policies and interests at play in the context of procurement. Going back to the general theme of the book, it seems to me that the balance of interests struck by the EU public procurement rules respects the ability of the Member States to promote local interests

[31] See eg Judgment of 28 March 1995, *The Queen v Secretary of State for the Home Department, ex parte Evans Medical and Macfarlan Smith*, C-324/93, EU:C:1995:84. See also Judgment of 5 December 1989, *Commission v Italy*, C-3/88, EU:C:1989:606.

and to sustain local particularism under this common EU policy framework, and to contribute to the balanced and sustainable operation of EU procurement policies.

More generally, I think that this contribution shows how many a criticism of the EU public procurement regime for not leaving sufficient regulatory space to the Member States does not have much to do with the balance between EU and national interests, but rather results from different normative understandings of the purpose and role of public procurement *anywhere*. Quite naturally, those holding conceptions of public procurement as a regulatory device, which allows the State to intervene in the market and to determine the way it operates—at least where it is directly involved in the transaction (*ie* where it is using its funds as leverage to force or promote specific behaviour by market agents)—will take issue with my analysis and conclusions. On the contrary, I would expect agreement from those that understand procurement as an instrument or tool for the public sector that simply aims to ensure adequate and efficient provision of the goods, services and works needed in the discharge of public missions. That debate is proving long-lasting and difficult to close. However, I hope that the analysis in this chapter helps disentangle this normative debate from the more specific issue of regulatory or competential struggle between the EU and its Member States. If it serves to illustrate the point, it is worth stressing that the same discussions on whether the instrumentalisation of procurement is adequate or desirable, or on whether there should be space for non-economic considerations to drive procurement decisions, takes places in regulatory contexts completely detached from the European Union. Therefore, in my opinion, these issues do not reflect a potential clash between national and EU interests, or any limitations on the space for national interests within EU law, but more basically result from fundamental disagreements about the nature and purpose of public procurement regulation.

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